STATE OF MICHIGAN

COURT OF APPEALS

VIP CUSTOMS BROKERAGE SERVICES, INC., INTERNATIONAL VEHICLE IMPORTERS, INC., WOLVERINE AUTO PURCHASING, INC., ELECTRONIC TECHNOLOGY CONVERSIONS, INC., INSTRUMENTATION TECHNOLOGIES, INC. and ONLINE SPEEDOMETER, INC.,

Plaintiffs,

and

JOHNNY COOPER,

Plaintiff/Counter-Defendant-Appellee,

UNPUBLISHED
August 29, 2006

v

No. 259386
Genesee Circuit Court
LC No. 02-72517-CK

ADESA IMPORTATION SERVICES, INC. and ADESA CORPORATION,

Defendants/Counter-Plaintiffs-Appellants,

and

BRIAN J. WARNER,

Defendant/Counter-Plaintiff.

Before: Hoekstra, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendants, ADESA Importation Services, Inc. (AIS) and ADESA Corporation, (ADESA) appeal as of right from a $6,373,811.78 net judgment in favor of plaintiff, Johnny Cooper, in this contract dispute between the parties pertaining to the scope of an agreement where Cooper agreed to sell the assets of VIP Customs Brokerage Services, Inc. ("VIP"), International Vehicle Importers, Inc. ("IVI"), Wolverine Auto Purchasing, Inc. (WAP or Wolverine), and Instrumentation Technologies, Inc. (ITI), (collectively referred to as the "Selling Corporations" or "Sellers"), to defendant AIS, a newly formed corporation and wholly owned subsidiary of defendant ADESA. The parties also dispute the existence and breach of a separate oral agreement ("oral side agreement") pertaining to Cooper's compensation and role as general manager of AIS. The jury found that defendants breached the oral side agreement and found in favor of defendants on three of the theories raised in their counterclaim.[1] We affirm.

I

Cooper owned and successfully operated businesses, VIP, IVI, Wolverine, and ITI, which were engaged in the importation and sale of vehicles. In the summer of 2000, ADESA approached Cooper to discuss the purchase of the assets of Cooper's businesses by a new corporate entity, AIS, to be formed by ADESA. The transaction based the final purchase price of the Selling Corporations assets on AIS' performance at the end of the year. The Sellers received a down payment, with the balance of the purchase price to be calculated pursuant to a formula based on the financial statements of AIS for the year ended December 31, 2001.

The Asset Purchase Agreement, drafted by all the parties and executed by each Seller, Cooper, and AIS, provides in pertinent part:

> THIS ASSET PURCHASE AGREEMENT ("Agreement"), dated as of December 21, 2000 (the 'Effective Date"), is made and entered into by and among ADESA . . . (The "Purchaser"), VIP Customs Brokerage Services, Inc., . . . ("VIP"), International Vehicle Importers, Inc. . . . ("IVI"), Instrumentation Technologies, Inc., . . . ("ITI") and Wolverine Auto Purchasing, Inc. . . . ("Wolverine") (collectively, the "Sellers" and individually a "Seller" and Johnny G. Cooper (the "Shareholder").
>
> * * *
>
> WHEREAS, the Shareholder owns all of the outstanding shares of capital stock of the Sellers and has become party to this Agreement and made the representations and warranties set forth herein as a material inducement to the Purchaser to enter into this Agreement and to consummate the transactions provided for or contemplated by this Agreement; and
>
> WHEREAS, the Purchaser desires to purchase from Sellers, and the Sellers desire to sell to Purchaser the Acquired Assets, as hereinafter defined, upon the terms and subject to the conditions set forth in this Agreement;

[1] The Seller Corporations were dismissed from this action before the case was submitted to the jury. As used in this opinion, "plaintiff" refers to Cooper.

* * *

ARTICLE III

PURCHASE PRICE

> Section 3.01. Purchase Price and Payment. Subject to the terms and conditions set forth in this Agreement, as full consideration for the Acquired Assets, the Purchaser shall pay to the Seller in the aggregate (a) at Closing an amount equal to Two Million Five Hundred Thousand Dollars ($2,500,000), and (b) on the date that is later the later of (i) five (5) days after the receipt by the Purchaser of the audited financial statements of the Purchaser for the year ended December 31, 2001, or (ii) two (2) Business Days after the Final Determination of the Purchaser's Adjusted Pretax Income pursuant to the procedure set forth in Section 3.02, the Additional Purchase Price as defined in Section 3.02 (collectively, the "Purchase Price"). The Purchase Price shall be allocated among the Sellers and the Acquired Assets as set forth on Schedule 3.01. Each Seller acknowledges actual receipt in full of the portions of the Purchase Price to be paid at Closing.
>
> Section 3.02. Additional Purchase Price. The "Additional Purchase Price" shall be an amount equal to (a) the sum of (i) the Base Pretax Income Amount multiplied by 3.5, plus (ii) the Factory Account Pretax Income Amount, multiplied by 0.25, plus (iii) the Volvo Pretax Income Amount multiplied by 1.0, less (b) two Million Five Hundred Thousand Dollars ($2,500,000). No later than the fifth Business Day after Purchaser's receipt of the final audit report with respect to the financial statements of the Purchaser for the year ended December 31, 2001, the Purchaser shall deliver to the Shareholder a copy of its audited financial statements together with a reasonably detailed calculation of the amount of the Additional Purchase Price for such Period. The calculation as delivered by the Purchaser shall be final and binding on the parties to this Agreement, provided, that if the Shareholder disagrees with such calculation, (i) the Shareholder may, within (5) Business Days of receipt of the calculation, so notify the Purchaser in writing and promptly cause such calculation to be reviewed by and independent certified public accountant . . . . [Footnote added.]

The parties' agreement also contained integration and amendment clauses, which provide:

> Section 9.10. Entire Agreement. This Agreement contains the entire understanding among the parties hereto with respect to the transactions contemplated hereby and supersedes and replaces all prior and contemporaneous agreements and understandings, oral or written, with regard to those transactions. All exhibits and schedules are expressly made a part of this Agreement as fully as though completely set forth herein.
>
> Section 9.11. Amendments: Waivers. This agreement may be amended or modified, and any of the terms, covenants, representations, warranties or conditions hereof may be waived, only by a written instrument executed by the

> parties hereto, or in the case of a waiver, by the party waiving compliance. Any waiver by any party of any condition, or of the breach of any provision, term covenant, representation or warranty contained in this Agreement, in any one or more instances, shall not be deemed to be or construed as a further or continuing waiver of any condition or of the breach of any other provision, term, convenant, representation or warranty of this Agreement.

In addition, pursuant to an oral side agreement, AIS would hire Cooper as its general manager through December 31, 2001, and ADESA would, among other things, immediately provide a minimum of $6 million in new capital, customers, marketing and sale opportunities and technological improvements to AIS. In consideration of these agreements, the Selling Corporations and Cooper would receive a down payment of $2,500,000 at the closing of the sale of the Selling Corporations' assets and 3.5 times the earnings of AIS in 2001 above the $2.5 million down payment. Cooper would also be paid a salary with an opportunity for a bonus as an employee of AIS. Cooper also executed a confidentiality and non-compete agreement and assumed his role as general manager of AIS.

Subsequently, ADESA and Cooper agreed to extend the earn-out period for one year, until December 31, 2002, after AIS did not experience significant marketing or sales opportunities. However, ADESA determined that Cooper was not entitled to any payment under the earn-out provision because ADESA determined the financial results for AIS were inaccurately stated for each month in 2001. Defendants further determined that, contrary to AIS' financial records showing a small profit, AIS was actually operating at a loss of approximately 1.7 million for 2001. To account for this loss, a correcting entry of approximately $2 million was made for the month December 2001 on AIS' profit & loss statement (P & L statement). Shortly thereafter, on January 17, 2002, ADESA executives appeared with the police at the building leased by AIS, but owned by one of Cooper's entities, and removed Cooper and his staff from the building. ADESA accused Cooper of embezzlement, among other things, and terminated Cooper's employment.

Cooper's amended complaint asserted ten counts. However, only Count I (breach of contract - operations), pertaining to the oral side agreement, is relevant to this appeal.[2] Cooper alleged that, despite its agreements, ADESA failed to immediately provide AIS with any capital, infrastructure improvements, new customers, marketing or sales opportunities and because the "earn-out formula" as reflected in Section 3.02 of the Asset Purchase Agreement was based on a fixed period of time, ADESA's untimely performance crippled AIS. In response, defendants raised four counterclaims, alleging breach of fiduciary duty (Count I), breach of the confidentiality and the non-compete agreement/misappropriation of trade secrets (Count II), misrepresentation/fraud (Count III), and conversion (Count IV).

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[2] Of the four counts in Cooper's amended complaint that proceeded to trial, the jury found in favor of plaintiff on Count I and in favor of defendants on the three remaining counts: Counts IV (promissory estoppel-Online), V (breach of contract – Port Huron) and VIII (breach of Asset Purchase Agreement as to AIS only).

Defendants filed multiple motions for summary disposition under MCR 2.116(C)(8) and (10) asserting that Cooper's claims predicated on an oral agreement were precluded under the integration and amendment clauses of the Asset Purchase Agreement; that Cooper lacked standing to assert that the $6 million never came as that agreement was between ADESA and AIS, not Cooper; and that his claims regarding the infusion of capital claims and infrastructure support were encompassed in the Asset Purchase Agreement. Conversely, Cooper responded that the integration clause did not bar the enforcement of the oral side agreement as that agreement pertained to different subjects and different parties, that defendants admitted the existence of an oral agreement outside the Asset Purchase Agreement, and that subsequent oral modifications to an agreement are enforceable.

The trial court denied defendants' respective motions, concluding the oral side agreement or Cooper's employment and compensation were not contemplated by the Asset Purchase Agreement. The trial court concluded that the integration or amendment clause did not foreclose subsequent agreements with different parties. The trial court also rejected defendants' standing argument, concluding that Cooper's financial interest in AIS granted him standing to pursue his claims that ADESA failed to adequately support AIS.

Defendants also filed multiple motions to strike Cooper's damages claim in its entirety as well as plaintiff's expert, Gary Leeman, arguing that Leeman should be precluded from testifying as the bases of his opinion were founded erroneous assumptions as he relied on Cooper's representations and failed to conduct an independent investigation. Therefore, defendant contended Leeman's testimony was inadmissible under MRE 703. The trial court denied defendants' motions, concluding it was a matter of credibility and weight and not a matter of admissibility.

Following trial, the jury returned a verdict in favor of Cooper on Count I (breach of contract-operations) in the amount of $5,805,834. The jury found in favor of ADESA and AIS on three of defendants' counterclaims in the amount of $69,136.00: Count I (Breach of Fiduciary Duty), Count II (Breach of Confidentiality and Non-Compete Agreement and Misappropriation of Trade Secrets); and Count III (Misrepresentation/Fraud) of their counterclaim and in favor of Cooper on Count IV (Conversion). Accordingly, the trial court entered judgment in favor of Cooper in the amount of $6,373,811.78 inclusive of prejudgment interest. The trial court denied defendants' motion for JNOV, remittitur or for a new trial. Defendants now appeal, challenging the trial court's denials of their motions for summary disposition, motions to strike Cooper's expert witness, for directed verdict and for JNOV, remittitur or for a new trial.[3]

[3] Cooper cross-appealed, however the cross-appeal was dismissed pursuant to a stipulation agreement. *VIP Customs Brokerage Svcs, Inc, v ADESA Importation Svcs*, unpublished order of the Court of Appeals, issued March 10, 2006 (Docket No. 259386).

II

A ruling on a motion for summary disposition is reviewed de novo. *Campbell v Sullins*, 257 Mich App 179, 185-186; 667 NW2d 887 (2003). Whether a party has standing is a question of law, which this Court also reviews de novo. *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 734-735; 629 NW2d 900 (2001).

In reviewing a ruling granting a directed verdict, this Court must view the testimony and all legitimate inferences from the testimony in a light most favorable to the nonmoving party to determine whether a prima facie case was established. *Campbell, supra* at 185-186. A directed verdict is appropriate only when no factual question exists regarding which reasonable minds could differ. *Id.* Only if the evidence failed to establish a claim, as a matter of law, is a directed verdict appropriate. *Id*.

This Court reviews a motion for JNOV by reviewing the evidence and all legitimate inferences in the light most favorable to the nonmoving party. The motion should be granted only where the evidence, when so viewed, fails to establish a claim as a matter of law. *Orzel v Scott Drug Co*, 449 Mich 550, 557-558; 537 NW2d 208 (1995). If reasonable jurors honestly could have reached different conclusions based upon the evidence, neither the trial court nor this Court may substitute its judgment for that of the jury. *Hamann v Ridge Tool Co*, 213 Mich App 252, 254; 539 NW2d 753 (1995).

A trial court's decision on a motion for a new trial is reviewed for an abuse of discretion. MCR 2.611; *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761; 685 NW2d 391 (2004). Similarly, this Court reviews for abuse of discretion a trial court's decisions regarding the ultimate admissibility of the expert witness's testimony. *Tate v Detroit Receiving Hosp*, 249 Mich App 212, 215; 642 NW2d 346 (2002). A trial court's denial of a motion for additur or remittitur is also reviewed for an abuse of discretion. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 595; 708 NW2d 749 (2005), citing *Hill v Sacka*, 256 Mich App 443, 460; 666 NW2d 282 (2003). When reviewing for additur, the appropriate inquiry is whether the evidence supports the jury's award. *Robertson, supra* at 595.

III

Defendants first contend, in reliance on Asset Purchase Agreement's integration clause, that the oral side agreement is superseded and replaced by the Asset Purchase Agreement and thus the trial court improperly denied its motions for summary disposition, directed verdict and JNOV.

Whether an oral contract exists and whether it has been breached are questions of fact. *Bullock v Automobile Club of Michigan*, 146 Mich App 711, 719-720; 381 NW2d 793 (1985). A contract will be implied only if there is no express contract covering the same subject matter. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003).

The integration clause in the Asset Purchase Agreement provides:

> <u>Section 9.10.</u> <u>Entire Agreement</u>. This Agreement contains the entire understanding among the parties hereto with respect to the transactions

> contemplated hereby and supersedes and replaces all prior and contemporaneous agreements and understandings, oral or written, with regard to those transactions. All exhibits and schedules are expressly made a part of this Agreement as fully as though completely set forth herein

We find no error in the trial court's determination that the oral side agreement or Cooper's employment and compensation were not contemplated by the Asset Purchase Agreement. We agree that the integration clause did not foreclose subsequent agreements with different parties. Section 9.10 unambiguously limits its scope to " . . . the parties hereto" and ". . . the transactions contemplated hereby." The clause provides that the written agreement supersedes all prior and contemporaneous understandings "with regard to *those* transactions" (emphasis added). Stated differently, "those transactions," does not refer to employment or operation agreements, but rather to the assets as listed in Schedule 2.01 of the agreement, i.e. "Contracts, Equipment and Machinery, Files and Records . . ." Further, ADESA was not a signatory to the Asset Purchase Agreement. Only AIS, the Sellers, and Cooper—in his capacity as shareholder—executed the Asset Purchase Agreement. Thus, any agreement between Cooper and ADESA clearly is not superseded by the Asset Purchase Agreement.

For this same reason, we reject defendants' contention that Cooper is estopped from raising a breach of contract claim because he executed the asset purchase agreement. Estoppel does not create a contract but the general rule is that if in making a contract, the parties agreed upon or assumed the existence of a particular fact as the basis of their negotiations, they are estopped to deny the fact as long as the contract stands, in the absence of fraud or mistake. *Paul v Univ Motor Sales Co*, 283 Mich 587, 603; 278 NW 714 (1938). Here, the subject matter of the oral side agreement is not the same as the subject matter of the Asset Purchase Agreement, thus defendants have not shown that all the elements of estoppel are present in this case. Therefore, given the clear contract language and evidence supporting the existence of a separate operations agreement, defendants failed to establish the absence of an issue of material fact. The trial court properly denied the motions for summary disposition, directed verdict, and JNOV.

Defendants also argue the trial court improperly denied their motion for summary disposition, rejecting their claim that Cooper lacked standing. We disagree.

"Standing is a legal term used to denote the existence of a party's interest in the outcome of litigation that will ensure sincere and vigorous advocacy." *House Speaker v State Admin Bd*, 441 Mich 547, 554; 495 NW2d 539 (1993). Defendants correctly assert that Cooper, as the sole shareholder of the Seller Corporations, may not assert corporate rights. *Belle Isle Grill Corp, supra* at 473-474; *Michigan Nat'l Bank v Mudgett*, 178 Mich App 677, 679-680; 444 NW2d 534 (1989). The real party in interest must prosecute a cause of action. MCR 2.201(B). In general, "a suit to enforce corporate rights or to redress or prevent injury to the corporation, whether arising out of contract or tort, must be brought in the name of the corporation and not that of a stockholder, officer, or employee." *Environair, Inc v Steelcase, Inc*, 190 Mich App 289, 292; 475 NW2d 366 (1991), overruled in part by 268 Mich App 83 (2005), citing *Mudget, supra* at 679. Thus, an individual must establish the violation of a duty owed directly to the individual that is independent of the corporation. *Belle Isle Grill*, *supra* at 474. "This exception does not arise, however, merely because the acts complained of resulted in damage both to the corporation and to the individual, but is limited to cases where the wrong done amounts to a breach of duty owed to the individual personally." *Mudget*, *supra* at 679-680.

Here, Cooper has shown a violation of a duty owed directly to him. In his amended complaint, Cooper alleged three breach of contract actions, Counts I-II and VIII. Count I pertained specifically to the oral side agreement and Counts II and VIII pertained to the asset purchase agreement.[4] In Count I, he alleged, among other things, that he was hired to operate AIS, entitling him to a salary and bonus as an AIS employee and that defendants' breach affected his attempts to successfully operate AIS. Given these allegations, we conclude Cooper alleged claims distinct from those of the Seller Corporations to establish his standing to pursue an action for breach of the oral side agreement. Accordingly, the trial court reached the right result and properly denied defendants' motion for summary disposition. *Grand Trunk Western R, Inc v Auto Warehousing Co*, 262 Mich App 345, 354; 686 NW2d 756 (2004).

Next, defendants raise several claims contending that the jury's verdict lacks adequate evidentiary support and/or is against the great weight of the evidence, making it reversible error for the trial court to have denied defendants' motion for JNOV/new trial. We decline to address defendants' first contention that the terms of the oral agreement were too indefinite to be enforced. Defendants did not raise this issue in their pretrial motions, at trial, or in their motion for directed verdict. "[A]bsent unusual circumstances, issues not raised at trial may not be raised on appeal." *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). Even if we were to address the issue, we would conclude, given our review of the record, that the testimony and evidence in this case described promises that were sufficiently definite to establish an express oral contract and the time and manner of defendants' breach.

Next, defendants contend that, given ADESA's investment of $4 million in AIS by May 2001 and a total investment of $6 million by the end of 2001, plaintiff failed to demonstrate how the profit margins of AIS would have altered by any change in the timing of the infusion of capital. We disagree.

The record evidence in this case demonstrates that the majority of the $6 million paid went toward administrative expenses, i.e., payroll, insurance, garage, employee 401(k) plans, and not the wholesale activities, capital improvements, or GST funding account, as agreed to by ADESA and Cooper. More importantly, given the evidence at trial supporting a finding that $2.5 million for wholesale activities was owed immediately, a reasonable juror could conclude that defendants' untimely payments affected AIS' ability to meet its goals. Plaintiff's evidence demonstrated that, as early as late January 2001, AIS experienced cash flow difficulties, bounced checks and had to cease vendor purchases for lack of sufficient funds.

These losses were sufficient to minimally establish an injury caused by defendants' breach. "Damages" are the pecuniary compensation or indemnity which may be recovered in

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[4] Counts II and VIII pertained specifically to the asset purchase agreement and were dismissed by stipulation agreement. Count II raised a breach of contract claim pertaining to defendants agreement to extend Cooper's employment and the computation of the earn out payout to December 31, 2002. In Count VIII, he alleged a breach of the asset purchase agreement, principally alleging that defendants hindered AIS' ability to maximize profits.

court by any person who has suffered a loss, detriment or injury to his person, property or rights. *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 497; 628 NW2d 491 (2001).

> Damages are not speculative simply because they cannot be ascertained with mathematical precision. Further, the certainty requirement is relaxed when damages have been established but the amount of damages remains an open question. Although the result may only be an approximation, it is sufficient if a reasonable basis for computation exists. Questions regarding what damages may be reasonably anticipated is an issue better left to the trier of fact. [*Everton v Williams*, 270 Mich App 348, 351; 715 NW2d 320 (2006), citing *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 96-97; 706 NW2d 843 (2005).]

Next, defendants contend that the condition precedent, requiring that AIS obtain a pretax profit of more that $700,000 at the end of 2001, was never satisfied. Defendants contend that because the corrected AIS financial statements demonstrate a loss of $2.4 million, no reasonable juror could conclude the condition precedent was satisfied. We disagree.

"Generally, where performance is dependent upon a condition precedent, the cause of action does not accrue until the condition is fulfilled and the promise is not performed." *Scherer v Hellstrom*, 270 Mich App 458, 464; 716 NW2d 307 (2006), citing 54 CJS, Limitation of Actions, § 168. Here, as discussed more fully below, the jury was presented with two different accounts of AIS' financial position at the end of 2001, and thus a dispute of material fact existed sufficient to preclude a grant of defendant's motion for JNOV. Accordingly, defendants are not entitled to relief on this basis.

Next, defendants claim error on several grounds contending that the trial court improperly admitted plaintiff's expert's testimony, contrary to MRE 702 and 703. We disagree.

"MRE 702 requires the trial court to ensure that each aspect of an expert witness's proffered testimony--including the data underlying the experts theories and the methodology by which the expert draws conclusions from that data--is reliable." *Gilbert, supra* at 779. The subject of the scientific testimony need not be "known to a certainty . . . [a]s long as the basic methodology and principles employed by an expert to reach a conclusion are sound and create a trustworthy foundation for the conclusion reached, the expert testimony is admissible . . . ." *Nelson v American Sterilizer Co*, 223 Mich App 485, 491-492; 566 NW2d 671 (1997). Under MRE 703, the facts or data on which an expert bases an opinion or inference must be in evidence, but the trial court may receive expert testimony subject to the condition that the factual bases of the opinion be admitted in evidence at a later time.

Citing *De Jager Constr, Inc v Schleininger*, 938 F Supp 446 (ED Mich, 1996) and *SEC v Lipson*, 46 F Supp 2d 758 (ND Ill, 1999), defendants principally contend that Leeman's testimony should have been excluded because his testimony was based on facts not in evidence. Defendants contend that Leeman relied on Cooper's representations and thus, he failed to conduct a meaningful independent investigation. We find no error.

In *De Jager*, the court deemed the plaintiff's damages expert's testimony inadmissible because it "blurr[ed] the distinction between substantive liability and a calculation of damages . . . and was as much substantive assertions and arguments about the liability of the defendant as it [was] a calculation of damages." *De Jager*, *supra* at 449. The *De Jager* court reasoned that if the plaintiff wanted to prove the defendant's wrongful actions, he had to do so by using facts introduced into evidence, and could not use the testimony of the expert to weave a story. *Id*.

Similarly, in *Lipson*, the court found unreliable the defendant's expert's opinion because it was not premised on the principles, practices, or methodology of accounting; the expert never attempted to audit, determine the accuracy, or assess the reliability of the financial reports, the expert disregarded relevant financial information and the defendant admitted he intended to have the expert testify "because the jury might view the defendant's testimony with skepticism due to his obvious interest in the outcome of the case." *Lipson, supra* at 761-763.

Here, we find no record support for the contention that Leeman testified to establish the credibility of Cooper's witnesses or that defendants breached the oral side agreement. Rather, the record demonstrates Leeman offered testimony, without objection, to assist the factfinder in quantifying plaintiff's damages. Moreover, the record demonstrates that Leeman did not rely solely on Cooper's representations. In conducting his investigation, he reviewed the pleadings, the due diligence file,[5] an AIS budget, financial statements, tax returns for the Selling Corporations, and financial statements filed with the Securities and Exchange Commission (SEC). These facts distinguish this case from *De Jager* and *Lipson*.

As we stated previously, although a damages calculation "may only be an approximation, it is sufficient if a reasonable basis for computation exists." *Everton, supra.* Because Leeman reviewed the available factual materials concerning AIS' financial position, and the jury was free to accept either party's theories of the case on the ultimate issue of defendants' breach, we conclude defendants have not demonstrated Leeman's testimony was insufficient under MRE 702 and 703. Given the competing theories of the facts, we find no abuse of discretion and the trial court properly determined defendants' argument is directed more toward the weight and credibility of Leeman's testimony rather than its admissibility.

We decline to address defendants' remaining challenges to the admissibility of Leeman's expert's testimony given that defendants' provide a cursory discussion of the trial record and only rely on case law that is inapplicable to the facts of this case. Further, defendants' remaining challenges to Leeman's testimony are not supported by the record or constitute expanded arguments raised for the first time on appeal. "[A]bsent unusual circumstances, issues not raised at trial may not be raised on appeal." *Peterman, supra* at 183.

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[5] The due diligence files refers to ADESA's fact finding investigation of Cooper's companies before the Asset Purchase Agreement was executed and involved reading documents, contracts, leases, analyzing financial information that involves legal, financial and personnel issues.

Next, defendants argue that they were denied a fair trial based on misconduct by plaintiff's counsel during closing argument on four grounds: (1) plaintiff used an inaccurate colorized chart to misrepresent the financial information at trial by excluding millions of dollars of preparation costs attached to vehicles; (2) plaintiff failed to provide defendants with a copy of the chart until after trial; (3) plaintiff stated that defendants had "cooked the books;" and (4) plaintiff compared defendants to Enron, Worldcom, Martha Stewart and similar corporate scandals. Defendants did not object to plaintiff's counsel's closing argument, therefore this issue is unpreserved:

> When reviewing an appeal asserting improper conduct of an attorney, the appellate court should first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. If the error is so preserved, then there is a right to appellate review; if not, the court must still make one further inquiry. It must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial. If the court cannot say that the result was not affected, then a new trial may be granted. [*Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 501; 668 NW2d 402 (2003), quoting *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 103; 330 NW2d 638 (1982).]

Here, with regard to the condensed colorized chart, counsel's conduct was not improper. Central to the parties' dispute at trial was the accuracy of AIS' accounting. Defendants contended that Cooper approved accounting methods designed to hide financial losses in excess of $2 million. However, plaintiff presented evidence that AIS' financial records, showing a profit of approximately $2 million, were reviewed by several ADESA executives with accounting backgrounds and an independent auditor with satisfactory results—prior to defendants' claim of alleged improper accounting in January 2002. Defendants never presented the auditor to testify or his reports. Accordingly, plaintiff theorized that defendants were hiding evidence and orchestrated the claim of improper accounting to avoid its obligation to pay Cooper the earn-out payment. See *Reetz, supra* at 109 n 24 (observing that a failure to produce evidence raises a presumption arises that the evidence, if produced, would be unfavorable). In this case, because the chart was related to the evidence and plaintiff's theory at trial, defendants have not established error. See *Phillips v Diehm*, 213 Mich App 389, 402-403; 541 NW2d 566 (1995) (noting that the defendant was not substantially prejudiced by charts first shown to the jury during closing arguments, where the defendant did not object, the charts contained nothing that the jury had not already seen without objection in open court, and the defendant had the opportunity to comment about the charts during closing argument).

We also find no error in plaintiff's failure to provide opposing counsel with copies of the charts before their use in closing argument. We note that defendant never objected to the use of the charts during closing argument. Further, the charts were not evidence. Rather, the charts were merely demonstrative aids used to assist plaintiff during closing argument. Thus, use of the charts was no different than the use of an easel or chalk board.

We also conclude that counsel's comments, stating defendants "cooked the books," and comparing defendants to Enron, Worldcom, or Martha Stewart, do not constitute error requiring reversal. Attorneys are permitted to draw reasonable inferences from testimony during closing argument, *In re Miller*, 182 Mich App 70, 77; 451 NW2d 576 (1990), and granted wide latitude with respect to closing arguments. *Dunn v Lederle Laboratories*, 121 Mich App 73, 90; 328 NW2d 576 (1982). Here, plaintiff's counsel was free to argue the adverse presumption raised by defendant's failure to present the independent auditor retained to review AIS financial statements. Further, counsel's comments were limited compared to the voluminous record and do not constitute a "systematic effort to divert the jury from its true task--that of appropriately compensating the plaintiff for any losses suffered as a result of defendants' violation[s] and instead sought to inflame passion and to incite the jury to punish the defendant." *Gilbert, supra*. Moreover, any potential prejudice could have been removed by a curative instruction. Further, the trial court instructed the jury that the attorneys' remarks do not constitute evidence. *Tobin v Providence Hosp*, 244 Mich App 626, 641; 624 NW2d 548 (2001).

Finally, defendants contend the trial court erred in denying their request for additur on their counterclaims. We disagree.

A new trial or amendment to the judgment may be granted where excessive or inadequate damages appear to have been influenced by passion or prejudice. MCR 2.611(A)(1)(c). If the trial court finds that the only error in the trial was the inadequacy or excessiveness of the verdict, a motion for new trial may be denied, conditioned upon the nonmoving party's consent to the additur or remittitur. MCR 2.611(E)(1).

At trial, defendants sought to recover $971,385.00 based on counterclaims that Cooper diverted profits from AIS and/or misappropriated company equipment. Because the jury awarded defendants $69,136.00, defendants assert this amount must have been awarded for the "Smith" transaction,[6] in which defendants claimed $69,252.00 in losses. Thus, defendants contend that if the jury awarded damages for the "Smith" transaction, defendants are entitled to an additional $48,324.00, the amount of damages claimed for the "Kaumagraph"[7] transaction since the two transactions are "virtually identical."

Defendants' assumption is not supported by the record. The record demonstrates that verdict form did not allow the jury to itemize damages for each counterclaim and only directed the jury to simply "state the amount of damages suffered by Adesa." Therefore, nothing in the record establishes the specific basis for the award. Thus, defendants' assertion on this issue amounts to nothing more than speculation. Furthermore, defendants approved the verdict form, and have, therefore, waived the issue. See *Dedes v Asch*, 233 Mich App 329, 334-335; 590

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[6] "Smith" refers to transactions involving Smith Die and Mold Gear sets where defendants claimed $69,252.00 in damages after Cooper purportedly overcharged AIS for excess gear sets purchased by one of Cooper's companies for $24,768.00 but sold the gear sets to AIS in excess of $85,000.00.

[7] "Kaumagraph" refers to transactions where Cooper's business purportedly purchased faceplates at $14.46 a unit but sold the same faceplates to AIS at $45 a unit. Defendants claimed $48,324.00 in damages.

NW2d 605 (1998), rev'd on other grounds 469 Mich 487 (2003) (the defendant waived the issue by failing to object to the verdict form).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Brian K Zahra